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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 11, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MOTION FOR ENTRY OF DEFAULT AND FOR LEAVE TO PROCEED *EX PARTE*

The United States of America moves the Court to enter the default of the defendant and to grant leave to the United States to proceed herein *ex parte*.

This motion is made upon the ground that the defendant has not filed an answer to the complaint within the time allowed by the Court, or at all.

HERBERT BROWNELL, JR.,
Attorney General.
J. LEE RANKIN,
Solicitor General.

AUGUST 1956

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 11, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

BRIEF IN SUPPORT OF MOTION FOR ENTRY OF DEFAULT AND FOR LEAVE TO PROCEED *EX PARTE*

JURISDICTION

The Court has original jurisdiction of this suit under Article III, Section 2, Clauses 1 and 2, of the Constitution of the United States and 28 U.S.C. 1251(b)(2). On March 26, 1956, the Court entered its order granting the United States leave to file its complaint herein. 350 U.S. 990.

QUESTION PRESENTED

Whether the defendant in an original suit is in default where the Court over objection permits filing of the complaint and allows the defendant time to "answer" and the defendant within the time allowed files no answer but only a motion to dismiss.

STATEMENT

On June 5, 1950, this Court held that rights in the submerged lands and minerals underlying the Gulf of

Mexico, extending twenty-seven marine miles seaward from the ordinary low-water mark and outer limit of inland waters along the coast of Louisiana, belonged to the United States and not to the State. *United States* v. *Louisiana*, 339 U. S. 699. On December 11, 1950, the Court entered its decree in that case, enjoining Louisiana from removing minerals from the described area or carrying on activities thereon for that purpose, and requiring it to account to the United States for sums derived from the area after June 5, 1950, and due to the United States under the opinion, decree, and applicable principles of law. 340 U.S. 899.

By the Submerged Lands Act of May 22, 1953, Congress granted to the State, with certain exceptions, the submerged lands within its boundaries as those boundaries existed when the State entered the Union or as approved by Congress prior to the Act, or as extended to a distance of three marine miles, but in no event more than three leagues, from the coast line. "Coast line" was defined as the line of ordinary low water along that portion of the coast which is in direct contact with the open sea, and the line marking the seaward limit of inland waters. The Act released the claim of the United States, against the State or persons acting under its authority, for sums derived from the area so granted. 67 Stat. 29, 43 U.S.C. (1952 ed.) Supp. III, 1301-1315.

Louisiana claims that its boundary is three leagues from the coast, and that it accordingly received a grant of that extent under the Submerged Lands Act. The United States claims that the State's boundary is not more than three marine miles from the coast, and that the grant was correspondingly limited. Taking this

position that the area granted to Louisiana by the Submerged Lands Act extended seaward only three marine miles from the coast line, the United States on May 19, 1955, moved the Court to modify its injunction of December 11, 1950, to relieve the State of so much thereof as related to submerged lands within three marine miles of the coast line, and moneys derived therefrom. The State challenged the jurisdiction of the Court to modify its injunction after expiration of the term in which it was entered, and the Court on October 10, 1955, denied the Government's motion without opinion. *United States* v. *Louisiana,* 350 U.S. 812.

Thereafter, on December 19, 1955, the United States moved for leave to file its complaint in the present suit, to quiet its title to the submerged area more than three miles from the coast. A copy of the complaint accompanied the motion. On February 20, 1956, Louisiana filed its "Opposition to Motion for Leave to File Complaint against the State of Louisiana, and Brief in Support of Opposition." On March 26, 1956, this Court entered its order as follows (350 U.S. 990):

> The motion for leave to file the complaint is granted and the defendant is allowed 30 days within which to answer.

On April 10, 1956, the defendant applied to the Court for an extension of time for an additional 60 days within which to "plead and answer," upon the ground that a new Attorney General of Louisiana was about to take office and that resulting complications would necessitate such an extension. The United States did not oppose the application. On April 16, 1956, the

State was granted an extension of 60 days "within which to file answer."

On May 11, 1956, just a week before its new Attorney General took office, Louisiana filed in the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, an action numbered 38,780 and entitled *State of Louisiana* v. *Anderson-Pritchard Oil Corporation et al.* to enjoin federal officials from issuing leases of submerged land off the Louisiana coast. A temporary restraining order was issued, following which the case was removed to the United States District Court for the Western District of Louisiana, where the restraining order was modified as to non-federal defendants. On June 11, 1956, while remand proceedings were pending in the district court, this Court, on the motion of the United States, enjoined the Attorney General of Louisiana, and others, from prosecuting that suit or "any other case or cases involving the controversy before this Court." 351 U.S. 978.

On June 20, 1956, the State of Louisiana, through its Attorney General, filed in the Civil District Court, Parish of Orleans, State of Louisiana, a suit numbered 346,701 and entitled *State of Louisiana* v. *Humble Oil Company,* to require the Humble Oil Company to account for royalties on oil produced from land on which the State had issued it a lease, and which is part of the land to which the United States seeks to quiet its title against the State in the present case.

On June 22, 1956, the State of Louisiana filed herein its "Motion to Dismiss on Jurisdictional Grounds." It has filed no answer.

ARGUMENT

I

Defendant Has Not Answered as Required by the Court

The Court's order of March 26, 1956, allowed the defendant 30 days "within which to answer" (350 U.S. 990) and the order of April 16, 1956, as shown on the docket, allowed the defendant an additional 60 days "within which to file answer." Obviously, the Court is itself in the best position to know what it intended by those orders; but it is the understanding of the United States that the orders are not complied with by the filing of a motion to dismiss.

The Government's construction of the orders is supported by cases holding that a district court order extending time to "answer" does not permit the filing of a defensive motion, *Ju Shu Cheung* v. *Dulles*, 16 F.R.D. 550, 552 (Mass.); *Blackner* v. *Sun Oil Co.*, 2 F.R.S. 29 (N.J.) (time to "respond"); although there is also authority to the contrary.[1] See 2 Moore, *Federal Practice* (2d ed. 1948) 2235. The fact that the defendant had asked for an extension of time to "plead and answer" in the present case gives particular significance to the fact that the extension order of April 16 refers to an "answer" only.

Whatever reasons there may be for construing time to "answer" in a district court as including time to move for dismissal, such reasons are wholly absent in an original suit in this Court. The Federal Rules of Civil Procedure, while permitting both legal and factual defenses to be asserted by answer, allow a defend-

[1] *Auler* v. *Melrose*, 102 F.Supp. 28 (N.D. Ill.) (stipulation extending time to "answer"); *Blanton* v. *Pacific Mut. Life Ins. Co.*, 4 F.R.D. 200 (W.D. N.C.), appeal dismissed, 146 F.2d 725 (C.A. 4).

ant the option of filing one, and only one, motion to dismiss by which he may assert legal defenses, the filing of which extends his time for answering. Rule 12, F.R.C.P. Since the rule permits the filing of such a motion within the time allowed for answering, there may be justification for holding that an order extending time to "answer" also extends time for making such a motion, and that more explicit language is needed to show an intention that a defendant is to be deprived of his privilege of asserting legal defenses in advance of factual ones.

The situation in an original suit in this Court is quite different. Here a complaint can be filed only by leave of Court, on motion. Rule 9(5) of this Court allows the defendant sixty days within which to oppose that motion—three times as long as the twenty days allowed for an answer or motion to dismiss in a district court. Any legal defense may be asserted by such opposition. For example, the Court has denied leave to file where original jurisdiction was lacking, *Oklahoma* v. *Cook*, 304 U. S. 387; *Florida* v. *Mellon*, 273 U.S. 12; where the complaint was multifarious and lacked equity, *Alabama* v. *Arizona*, 291 U.S. 286; where an indispensable party was not joined, *Arizona* v. *California*, 298 U.S. 558; where the suit was in substance against the United States, *Louisiana* v. *McAdoo*, 234 U.S. 627; where a bill to perpetuate testimony did not show that the testimony would be relevant or material to the anticipated litigation, *Arizona* v. *California*, 292 U.S. 341; and where the proposed complaint did not state a good cause of action. *Alabama* v. *Texas*, 347 U.S. 272. Thus, the defendant in an original suit has ample opportunity before the complaint is filed to

make a separate assertion of his legal defenses, and when leave to file is granted he stands in a position analogous to that of a district court defendant whose motion to dismiss is denied and who must thereupon answer. The answer in either Court may, of course, include legal defenses; and in that respect a defendant is in a better position here than in a district court, for a motion to dismiss waives all legal defenses that it does not assert, except certain fundamental matters such as lack of jurisdiction (Rule 12(g), (h), F.R.C.P.), whereas opposition to filing a complaint does not have that effect.

No doubt, considerations like these entered into the formulation of Rule 9(6) of this Court, which departs from the Federal Rules of Civil Procedure to provide that "Additional pleadings may be filed, and subsequent proceedings had, as the court shall direct." Such considerations may also explain why the Court, in directing the pleadings in the present case, allowed the defendant time to "answer" only, without giving a second opportunity to make preliminary assertion of legal defenses. In any event, the fact is that the Court allowed the defendant until June 25, 1956, to file an answer. That date is long past, and no answer has been filed.

II

Default Should Be Entered and the United States Allowed to Proceed *Ex Parte*

The case presents no circumstances that should move the Court to withhold entry of default. The defendant's failure to file an answer cannot be attributed to any insufficiency of time within which to consider the allegations of the complaint. While leave to file the

complaint was not granted until March 26, 1956, the complaint itself has been in defendant's hands since the motion for leave to file was served on it, December 19, 1955. Furthermore, the position taken in the complaint is identical with that asserted by the United States in its motion to modify the injunction in *United States* v. *Louisiana*, No. 7, Original, October Term, 1954, served on the defendant with a supporting brief on May 19, 1955. Thus, the defendant has had substantially more than a year in which to consider not only the Government's allegations but also the arguments by which it supports them. There is no apparent reason why an answer could not have been formulated within the six months and more that elapsed between service of the complaint on the defendant with the application for leave to file and expiration of the time allowed by the Court for filing an answer. The defendant has found that interval sufficient for filing two new suits involving the same questions: *State of Louisiana* v. *Anderson-Pritchard Oil Corporation et al.*, filed in the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, on May 11, 1956, before such suits were enjoined herein by this Court on June 11, 1956, and *State of Louisiana* v. *Humble Oil Company*, filed in the Civil District Court, Parish of New Orleans, State of Louisiana, on June 20, 1956.

Neither can the State's failure to answer be attributed to any legal necessity for preserving its position by moving for dismissal. Rule 12(b), F.R.C.P., clearly permits assertion of all legal defenses by answer.

In addition, it is significant that the State took occasion to oppose the motion for leave to file the complaint on several grounds, and presented a detailed brief in

opposition to the filing. However, the jurisdictional grounds now asserted in the State's motion to dismiss were not raised at that time, although the grounds were well known to the State from previous litigation relating to the offshore lands.

The only conclusion to be drawn is that the defendant filed its motion to dismiss, rather than answer, for the purpose of delay; and this inference is strongly supported by the insubstantiality of the grounds on which the motion is made (see the Government's Brief in Opposition to the State's motion, which is being filed simultaneously), and by the fact that the defendant is initiating and prosecuting other litigation involving ownership of the area here in suit. Delay in the determination of this case imposes heavy economic burdens on the numerous lessees in the disputed area and on thousands of their employees whose work cannot go forward until the dispute is settled and it prevents orderly development of mineral resources that are highly important to the national economy and defense. The defendant's institution of other litigation presenting the same issue of disputed ownership causes unjustifiable expense and inconvenience to the defendants therein.

In asking for entry of default we do not overlook the practice of this Court to be liberal in allowing full development of the facts in original actions involving controversies between sovereigns. *United States* v. *Texas*, 339 U.S. 707, 715. Nevertheless, we press our motion since the State of Louisiana appears to have no desire to develop the facts. Meanwhile, its other actions in the area are causing great confusion and expense.

Under all these circumstances, it is submitted that the Court should enter the defendant's default and grant the United States leave to proceed ex parte, as under Rule 9(8) of this Court.

CONCLUSION

For the foregoing reasons, default should be entered and leave granted to the United States to proceed *ex parte*.

Respectfully submitted,

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